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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-493

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD LANG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

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The petitioner, The People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, Fifth Division entered in this proceeding on June 30, 1975.

OPINION BELOW

The opinion of the Appellate Court of Illinois reversing and remanding Donald Lang's murder conviction is reported at 26 Ill. App. 3d 648, 325 N.E. 2d 305 (1975). On June 30, 1975, the Supreme Court of Illinois denied both the People's petition for leave to appeal and the defendant's petition for leave to appeal.

JURISDICTION

The decision of the Appellate Court of Illinois was filed on February 14, 1975. The denial of the People's petition for leave to appeal to the Illinois Supreme Court was entered on June 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether defendant, a deaf-mute, having elected through his court appointed counsel to stand trial notwithstanding his incompetency, received a trial that comported with due process requirements of the Fifth and Fourteenth Amendments where the State's evidence was so strong that no substantial possibility existed which would have enabled defendant, but for his disabilities, to establish an alibi or other defense.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

A.

General Background

In the early afternoon hours of July 26, 1971, the body of Earline Brown was found, stuffed upside down into a closet in Room 201 of the Viceroy Hotel, located at 1519 W. Warren Boulevard, in Chicago. It was determined that Miss Brown had been beaten and strangled approximately 35 hours earlier. The defendant, Donald Lang, a deaf-mute, who is illiterate and virtually unable to communicate, was tried for murder [Illinois Revised Statutes 1971, Ch. 38, § 9-1(a)(1)] of Miss Brown before a jury, and was found guilty. Judgment was entered on the verdict, and after a hearing in aggravation and mitigation, defendant was sentenced to 14 to 25 years imprisonment at the Joliet Reception and Diagnostic Control Center.

Lang appealed his conviction to the Illinois Appellate Court, First District. The appellate court held that the evidence was factually sufficient to support the charge. *People* v. *Lang*, 26 Ill. App. 3d 648, 655, 325 N.E. 2d 305, 310 (1975). However, the appellate court found that absent special trial procedures to negative the effect of defendant's incompetency, he could not be constitutionally tried or convicted. *Id.* at 655, 325 N.E. at 309. The appellate court did not suggest any special compensatory trial procedures. Consequently, the court reversed the trial court judgment and remanded the case with instructions. Two other issues raised by defendant were not considered by the appellate court. The State and defendant filed petitions for leave to appeal in the Illinois Supreme Court. Both petitions were denied on June 30, 1975.

B.

Facts Material To The Question Presented

Defendant was indicted in December, 1965, for the murder of a woman, accomplished in the same manner and under circumstances similar to the murder of Earline Brown in the instant case. Defendant was found physically and mentally incompetent to stand trial. He was committed to the Illinois Department of Mental Health. Two years after commitment the superintendent of the institution to which Lang had been committed concluded that Lang would never acquire the communicative skills needed to participate and cooperate in his trial. Lang's attorney filed a petition for habeas corpus contending that Lang had been committed for life without ever having been given a trial. This petition was denied by the trial court. On appeal, the Illinois Supreme Court held that Lang should have been given a trial to determine whether he was guilty or should be released. *People ex rel. Meyers* v. *Briggs*, 46 Ill. 2d 281, 288, 263 N.E. 2d 109 (1971).[1] The case was reinstated, but the State was unable to proceed to trial because of the death of its principal witness. Defendant was released.

This case was brought to trial in January, 1972. Pursuant to the holding in *Meyers*, defendant had the choice of being committed as he had been before, or to stand trial. His attorney understandingly chose the risk of trial. *People* v. *Lang*, 26 Ill. App. 3d 648, 652, 325 N.E. 2d 305, 308 (1975).[2]

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1. The decision of the Supreme Court of Illinois was discussed in some detail in this court's opinion in *Jackson* v. *Indiana*, 406 U.S. 715, 735-36 (1972).

2. The facts surrounding Lang's trials and convictions were popularly related in *Tidyman, Dummy* (1974), a Book of the Month Club selection.

C.

Manner In Which The Federal Question Was Raised

The Federal question presented herein was originally raised by Donald Lang, by his motion for new trial and arrest of judgment after the entry of the verdict finding him guilty of murder (C. 240-245; Tr. 1576-78).

In its decision reversing Lang's conviction, the appellate court held that "[b]ecause required trial procedures were not provided as mandated by *Meyers, Jackson* (*Jackson* v. *Indiana,* 406 U.S. 715) and *Pate,* [*Pate* v. *Robinson,* 383 U.S. 375 (1966)] the trial in the instant case was constitutionally impermissible, and the conviction of defendant must be reversed and remanded. *People* v. *Lang,* 26 Ill. App. 3d 648, 655, 325 N.E. 2d 305, 310 (1975).

The Illinois Supreme Court denied the State's and defendant's petitions for discretionary leave to appeal. The Federal question presented herein has been properly raised and preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

Defendant Received A Trial That Comported With Due Process Requirements Of The Fifth And Fourteenth Amendments Where The State's Evidence Was So Strong That No Substantial Possibility Existed Which Would Have Enabled Defendant, But For His Disabilities, To Establish An Alibi Or Other Defense; Furthermore The Illinois Appellate Court's Holding Misconstrues Decisions Of This Court.

Contrary to the holding below, the State submits that prior decisions by this Court do not preclude the trial of defendant nor his conviction. This court stated in *Jackson* v. *Indiana,* 406 U.S. 715, 741: "We do not read this court's previous decisions [citing *Pate* v. *Robinson,* 383 U.S. 375 (1966)] to preclude, *at a minimum,* an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions, through counsel." (emphasis added). This view has been implemented in cases such as *Iverson* v. *North Dakota,* 450 F. 2d 414 (8th Cir. 1973) (preliminary hearing) and *Ex Parte Kent,* 490 S.W. 2d 649 (Mo. 1973). The thrust of the *Jackson* decision was foreshadowed in Illinois in *People ex rel. Meyers* v. *Briggs,* 46 Ill. 2d 281, 263 N.E. 2d 109 (1971). The Illinois Supreme Court held "defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." 46 Ill. 2d at 288. The manner in which that opportunity is to be arrived at depends upon the "circumstances of the case * * *." *Id.* at 287.

The appellate court implicitly held that the compensatory procedures had to be applied to the person of the defendant, and explicitly held that these procedures had to be applied at trial. In so holding, the appellate court concluded that defendant could not be tried under the circumstances of this case.

The State proposed on appeal a procedure that would compensate for defendant's disabilities and determine whether defendant's conviction was obtained in accordance with due process requirements. Since defendant is incapable of explaining or rebutting the State's evidence, due to his disabilities, the trial judge should assess the degree of probability that the defendant, were he normal, might do so. *Wilson* v. *United States,* 391 F. 2d 460, 463-64 (D.C. Cir. 1968). In order to make this assessment, the trial judge would consider the State's evidence to determine the extent to which this evidence in itself, forecloses the possibility of rebuttal. The strength of the State's evidence will be inversely related to the possibility that a normal defendant could rebut that evidence. As the State's evidence becomes stronger, the possibility that a normal defendant could rebut that evidence is proportionately diminished. When the State's evidence is so strong that it effectively forecloses the possibility of rebuttal by a normal defendant to the extent that it leaves no reasonable doubt in the mind of the trier of fact as to defendant's guilt, then, the State submits, a conviction based on such evidence should be affirmed.

The compensatory procedure set forth above should normally involve an inquiry to be made by the trial judge prior to entering judgment on the jury's verdict. The State submits that in cases such as the present one it would be confusing to submit an instruction to the jury

regarding the possibility of rebuttal by a normal defendant, and it would be more appropriate to require the trial court to make this final determination after the jury has found a defendant guilty in accord with standard procedures and instructions. In the instant case, the trial judge was not asked by either the State or the defense for such a special determination. Neither side felt the need for such a hearing.

However, defendant conceded before the appellate court that there was no issue regarding the credibility of any of the witnesses in this case. Consequently, it was the State's position on appeal that no prejudice could have resulted to defendant if the appellate court were to have made the inquiry and special determination suggested by the People, for the first time on appeal. Such action by the appellate court would not have been a usurpation of either the trial court's prerogative to make this determination or the jury's role in assessing the credibility of witnesses at trial.

The State contends that the facts of this case permit the employment of the proposed compensatory procedure by the reviewing court. Though this procedure should ideally be followed at trial, the fact that witnesses' credibility was not at issue justifies application of this compensatory process by the reviewing court. But the appellate court rejected this proposal. It held that for it to review on this basis would be in violation of *Jackson, Pate* and *Meyers*. It also held that practical compensatory trial procedures could not be provided. The appellate court held that the only fair compensatory procedures would be those which would be applied in the trial court. This erroneous interpretation of the due process clause imposes an impermissibly restrictive standard for prosecution upon the State.

The State submits that the requirements of due process must permit the circumstances of each case to dictate not only the appropriate type of compensatory procedure to be employed, but also the forum in which the procedure is applied. The circumstances of defendant's total deafness and inability to communicate in any meaningful way make it presently impossible for defendant intelligently to appreciate or participate in a trial. Therefore, the appellate court's holding, insofar as it requires compensatory facilities for defendant at trial, erroneously misconstrues this Court's holding in *Jackson*. Defendant's liabilities may lessen his ability and capacity to utilize his constitutional rights, but this should not prevent his being subject to trial.

Here, the appellate court's conclusion of law as to the defendant's Federal right to due process and its finding of facts are so intermingled as to make it necessary for this Court, in order to pass on the Federal question, to analyze the facts as presented by the record in this case. *See Ker* v. *California*, 374 U.S. 23, 33-34 (1963). The State urges this Court to determine whether the State's proposal conforms to due process criteria. Such a determination cannot be made with reference to the substance of the proposal alone. Therefore, the People also urge this Court to consider the suggestion for compensatory procedure in conjunction with the facts of this case as derived from the testimony taken at trial.

The procedure offered to compensate for defendant's disability comports with due process. The Appellate Court of Illinois erroneously concluded that: 1) defendant's trial was unfair and 2) the State's proposed compensatory procedure was inadequate. Furthermore, the appellate court has implicitly adopted an interpretation of due process

that is impermissibly restrictive to the State prosecutor. It fails to comport with even the minimum scope of latitude for prosecution set forth in *Jackson*. Such a restriction contravenes interpretations of due process by the Federal courts or by this Honorable Court. This interpretation is repugnant to the Constitution of the United States.

CONCLUSION

For these reasons the Writ of Certiorari should be granted to review the judgment and opinion of the Appellate Court of Illinois.

Respectfully submitted,

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